In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 877

ANDREW NICHOLSON, PETITIONER

v.

C. D. CALBECK, DEPUTY COMMISSIONER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR RESPONDENT IN OPPOSITION

1. Petitioner is a longshoreman whose claim under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*, was rejected by the Deputy Commissioner on the ground that a pierside injury is not covered by the Act (R. 6).[1] Both the district court and the court of appeals affirmed the denial of the claim on this ground.

The injury occurred on a pier while some hatch beams, which had been removed from a ship to facilitate loading, were being moved to a different part of the pier and accidentally struck petitioner. The pier

[1] "R." references are to the "Reproduction of Portion of the Original Record" filed with the court of appeals.

285-590—67

was erected on pilings and concrete blocks resting on the bed of navigable waters of the United States. The inshore edge of the pier was attached to the outboard edge of the employer's warehouse, and was not attached to or supported by land (R. 2). The courts below held that the injury did not occur "upon the navigable waters of the United States" within the meaning of the Act, 33 U.S.C. 903(a), since piers have traditionally been viewed as extensions of land. The Fifth Circuit rested its per curiam affirmance on its recent decision in *Travelers Ins. Co.* v. *Shea,* 382 F. 2d 344, pending on petition for certiorari *sub nom. McCollough* v. *The Travelers Ins. Co.,* No. 788, this Term, in which it had held that an injury on a permanently anchored floating pier did not occur upon navigable waters within the meaning of the Longshoremen's and Harbor Workers' Compensation Act.[2]

2. We believe that the decision below is correct. The Longshoremen's Act was passed to remedy the gaps and uncertainties created by a series of decisions holding that State workmen's compensation acts could not constitutionally apply to injuries within the sphere of maritime law, *e.g., Southern Pacific Co.* v. *Jensen,* 244 U.S. 205; *Knickerbocker Ice Co.* v. *Stewart,* 253 U.S. 149; *Washington* v. *W. C. Dawson & Co.,* 264 U.S. 219, except in unpredictable circumstances, see *Grant Smith-Porter Ship Co.* v. *Rohde,* 257 U.S. 469; *State Industrial Commission* v.

[2] Because of the peculiar facts in *McCollough*, we supported the claimant's position in the lower courts. Being of the view, however, that the case turns on its own facts, the government, on behalf of the Deputy Commissioner, has not sought or supported review by this Court.

Nordenholt Corp., 259 U.S. 263. It was settled, however, before the passage of the Act that injuries occurring on docks, wharves, and piers were compensable under State workmen's compensation laws, since the injuries were not maritime in nature. See *State Industrial Commission* v. *Nordenholt Corp., supra; T. Smith & Son, Inc.* v. *Taylor*, 276 U.S. 179, 181, 182. The federal enactment was not intended either to supersede or to duplicate areas of clear State coverage, as its language clearly shows. See 33 U.S.C. 903 (a). Furthermore, the relevant Senate Report stated:

> [I]njuries occurring in loading or unloading are not covered unless they occur on the ship or between the wharf and the ship so as to bring them within the maritime jurisdiction of the United States.

S. Rep. No. 973, 69th Cong., 1st Sess., p. 16.[3]

This Court subsequently indicated in *Swanson* v. *Marra Bros., Inc.*, 328 U.S. 1, that injuries on docks, wharves, and piers were not covered by the Act. In *Swanson*, the Court explained why an employee who suffered a pierside injury is restricted to local remedies:

> [S]ince * * * [the Longshoremen's] Act is restricted to compensation for injuries occurring on navigable waters, *it excludes from its*

[3] The reference to coverage of injuries "between the wharf and the ship" was perhaps prompted by this Court's decision in *Jensen*, *supra*, holding that a State compensation statute could not constitutionally be applied to an injury sustained on a gangplank between a vessel and wharf.

*own terms * * * any remedies against the employer for injuries inflicted on shore.*

Id. at 7. (Emphasis added.)

3. The recent case of *Calbeck* v. *Travelers Ins. Co.*, 370 U.S. 114, relied on by petitioner (Pet. 7), is consistent with this result. There, the Court, in agreeing with the Deputy Commissioner, held that an injury to an employee on an uncompleted vessel is not excluded from the Act's coverage merely because also covered by State law. The general purposes of the Act as seen by the Court were: (1) to insure that all maritime injuries are covered by some compensation act; and (2) to eliminate uncertainty in the choice of remedy. 370 U.S. at 119–122. Neither of these objectives is contravened by the holding of the lower courts here, since that holding, in accord with forty years of administrative practice, see 1927 A.M.C. 1558, 1855 (Opinion Nos. 5, 16), merely reaffirms the long-standing rule in an area always covered by State workmen's compensation acts. So far as the scope of the Longshoremen's and Harbor Workers' Compensation Act is concerned, this Court (in *Calbeck*) concluded that Congress intended to include any injuries whose coverage under State law was rendered questionable by *Southern Pacific Co.* v. *Jensen, supra, Knickerbocker Ice, supra,* and *W. C. Dawson & Co., supra.* 370 U.S. at 126. None of those cases involved pierside injuries; none of them cast doubt on the

rule that piers are merely extensions of the land.[4] The issue in *Calbeck* was explicitly confined to the question of coverage *vel non* of an injury that took place on an uncompleted vessel concededly afloat on the navigable waters. The holding that Congress intended the federal act to apply in that situation does not suggest that the Court was abandoning the settled standards for determining the logically anterior and statutorily distinct jurisdictional question whether the incident occurred "upon the navigable waters" at all.

4. Petitioner has cited no conflict among the circuits on this point, and we have found none. Quite the contrary, the major maritime circuits are in accord, for the Second, Fourth, and Ninth Circuits have reached the same conclusion as the Fifth Circuit below. *Johnston* v. *Marshall,* 128 F. 2d 13 (C.A. 9), certiorari denied, 317 U.S. 629; *Houser* v. *O'Leary,* 383 F. 2d 730 (C.A. 9); *Michigan Mut. Liability Co.* v. *Arrien,* 344 F. 2d 640, 644 (C.A. 2) (dictum), certiorari denied, 382 U.S. 835; *American Export Lines, Inc.* v. *Revel,* 266 F. 2d 82, 84 (C.A. 4) (dictum).[5]

---

[4] The Court in *Dawson* characterized the *Nordenholt* case, *supra*, as relating "to a claim based upon death which resulted from injuries received by the longshoreman while on the dock—a matter never within the admiralty [tort] jurisdiction." 264 U.S. at 227.

[5] Four other cases raising this issue are now pending in the Fourth Circuit. *Johnson* v. *Traynor*, No. 10298; *Klosek* v. *Traynor*, No. 10299; *Avery* v. *Oosting*, No. 10323; *Marine Stevedoring Corp.* v. *Oosting*, No. 10060. That court has ordered rehearings *en banc* in these cases in February 1968.

We therefore suggest that the petition for a writ of certiorari should be denied. If, however, the petition for a writ of certiorari in *McCollough* v. *The Travelers Ins. Co.*, No. 788, this Term, should be granted, we would not oppose granting the petition in the instant case. If the Court determines that the application of the federal Act to pierside injuries is an issue which warrants its plenary consideration, the instant case presents the matter in its typical context.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

DECEMBER 1967.

U.S. GOVERNMENT PRINTING OFFICE: 1967